Supreme Court, U.S.
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No. 06-445

IN THE

# Supreme Court of the United States

CONTSHIP CONTAINERLINES, LTD.,

*Petitioner,*

*v.*

PPG INDUSTRIES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the strict liability provisions of the U.S. Carriage of Goods by Sea Act, 46 U.S.C. App. 1304(6), protect an ocean carrier which agrees to carry known dangerous cargo where the cargo has additional or different dangerous propensities that are undeclared and unknown to the carrier.

2. Whether general provisions of International Maritime Dangerous Goods (IMDG) Code take precedence over specific stowage provisions for the commodity, absent anything in the IMDG to suggest such an order of precedence, so as to hold a carrier to a higher standard of care than that contained in the specific provision.

3. Whether 49 C.F.R. 173.21(f) (Shipper Packaging Requirements) applies to ocean carriers to as to defeat a carrier's claim against a shipper for negligent failure to warn the carrier of foreseeable dangers posed by the cargo it has tendered for shipment which are unknown to the carrier.

## RULE 29.6 STATEMENT

Petitioner, Contship Containerlines, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

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## OPINIONS BELOW

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The opinion of the U.S. District Court for the Southern District of New York is neither officially nor unofficially reported. (App. B)

## BASIS FOR JURISDICTION IN THIS COURT

The U.S. Second Circuit Court of Appeals Judgment was entered March 21, 2006.

Petitioner filed a timely petition for rehearing or rehearing en banc by the U.S. Second Circuit Court of Appeals. That petition for rehearing was denied by an order filed May 23, 2006. (App. C)

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED IN THE CASE

The U.S. Carriage of Goods by Sea Act, 46 US.C. App. 1304(6) provides:

> Inflammable, explosive, or dangerous cargo
>
> Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with

> knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

The relevant text of 49 C.F.R. 173.21(f) is set out in the Appendix to this Petition.

## STATEMENT OF THE CASE

***Basis for Federal Court Jurisdiction*:**

Jurisdiction in the district court was based upon the admiralty and maritime nature of the cause within the meaning of 28 U.S.C. § 1333 and F.R.Civ.P. 9(h).

Jurisdiction in the Court of Appeals existed because the judgment and opinion appealed from were a final decision of the district court within the meaning of 28 U.S.C. § 1291.

***Material Facts:***

The following material facts, as found by the Court, are undisputed:

1. Petitioner is a common carrier of goods by sea in international trade and the operator of the M/V CONTSHIP FRANCE..

2. Respondent is a manufacturer and shipper of hazardous commodities.

3. In September of 1997, respondent shipped with the petitioner a container loaded with eighty 425 lb. shrink wrapped.drums in two tiers of a chemical called UN No. 2880 Class 5.1 calcium hypochlorite ("Cal Hypo") from Norfolk VA to Australia pursuant to an ocean bill of lading contract of carriage.

4. Cal Hypo is unstable and subject to decomposition which generates heat. The greater the ambient temperature, the faster the decomposition and the greater the resulting heat. At a specific critical temperature, the decomposition becomes self-accelerating and results in a "thermal runaway."

5. The critical temperature of a drum of Cal Hypo depends upon its size, and this can only be determined by testing.

6. While at the port of Papeete, Tahiti, respondent's Cal Hypo suffered a thermal runaway which caused an explosion and fire aboard ship and resulted in damages to petitioner in excess of $12 million.

7. At the time the Cal Hypo was loaded aboard ship, it was identified in the IMDG Code provisions as being flammable. Petitioner was aware of that.

8. The IMDG Code contained two relevant provisions about respondent's Cal Hypo.

(a) A general provision said that it should be stowed away from sources of heat.

(b) A specific provision called the Individual Schedule Page for UN 2880 Class 5.1 said that the Cal Hypo should be stowed "away from sources of heat where temperatures in excess of 55 degrees C for a period of time exceeding 24 hours. or more."

9. The subject Cal Hypo was stowed by petitioner directly above the vessel's bottom center heated fuel tank which caused the ambient temperature surrounding the Cal Hypo to reach 47 degrees C – 8 degrees C *less* than the maximum temperature provided for by the applicable dangerous goods code.

10. Respondent was fully aware but chose not to tell Petitioner that the critical temperature of the UN 2880 Class 5.1 Cal hypo was in the range of 46 – 47 degrees C.

## REASONS FOR GRANTING THE PETITION

A Writ of Certiorari is sought pursuant to Supreme Court Rule 10(c) – that the U.S. Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The undersigned submits that this case warrants and justifies the issuance of a Writ for the following reasons.

First, the undersigned would brief and argue this case if the writ issues. I am a life long admiralty attorney and am thoroughly familiar with the legal issues involved, having argued and won a significant case that dealt exclusively with the sea carriage of dangerous goods in international trade under the U.S. Carriage of Goods by Sea Act. *See Senator Linie GmbH & Co. KG v. Sunway Line,* 291 F.3d 145 (2d Cir. 2002); see also:

- Tamulski, "Recent Developments in Cargo Law," 15 U.S.F. Mar. L.J. 159, 190 (2002 - 03) ("The decision in SENATOR LINIE Gmbh & Co. KG v. Sunway Line Inc. is potentially very significant.")

- Note, "Explosion on the High Seas," 33 Sw. U. L. Rev. 139, 143, 163 (2003) (Describing Senator Linie case as an important an progressive decision which will likely influence U.S. and perhaps international courts)

- Note, "The Senator Linie: Shipper's Strict Liability for Inherently Dangerous Goods," 27 Tul. Mar. L.J. 663, 669 (2003) ("The Second Circuit's holding in the noted case is a bold and controversial ruling for liability in the inherently dangerous-goods context. In light of the existing circuit split and general ambiguity regarding this issue, the Second Circuit's decision was both necessary and important. This definitive ruling, based on the plain statutory language of § 1304(6) and the broad goals of uniformity and efficiency for international maritime players, was a legally sound synthesis of policy and precedent.")

Second, the relevant facts, as found by the courts below, are undisputed. The issues to be decided are legal ones. Since those issues govern the sea carriage of hazardous goods in international trade, and since the shipment of undeclared or mis-declared hazardous goods has been the cause of more and more ship-wide disasters resulting in enormous losses to ship and cargo interests, a clear declaration by this Court of the rights and responsibilities of shipper and carrier is essential to the security and safety of our maritime ports and commerce.

Third, resolution of these issues in petitioner's favor would warrant reversal of the subject district court and appellate judgments.

The decision by the Courts below, if left to stand, would:

(a) Require ocean carriers to look beyond the relevant provisions of the IMDG Code and implementing Department of Transportation regulations in determining the nature and character of dangerous goods even where there is no reason to suppose that the goods present a greater than known danger. And,

(b) Provide a legal disincentive to a manufacturer/ shipper of dangerous goods to warn an unsuspecting ocean carrier that his goods possess a dangerous nature and character beyond what it set out in the relevant Individual Schedule Page of the IMDG or applicable Department of Transportation regulations for hazardous cargoes.

At a time when the security of our ports and commerce is a matter of the greatest national concern, the U.S. Second Circuit Court of Appeals has adopted a regressive

interpretation of the United States Carriage of Goods by Sea Act [46 U.S.C. App. 1304(3) and (6)] ("COGSA")]. The Court's interpretation not only threatens to disrupt the common carriage of goods in international trade, but by sanctioning false declarations by the shippers of hazardous goods, it puts our ports in greater danger of a crippling catastrophe. Lives are being put at risk because the Second Circuit has chosen to return to a COGSA hazardous cargo liability scheme based on an utterly unwieldy and subjective negligence standard rather than strict liability – a scheme that was soundly and persuasively rejected by that same Court in 2002.

The stakes here are enormous. Millions of export and import containers transit the U.S. each year. Hundreds of thousands of those contain hazardous goods, and too many of them have been blowing up with alarming regularity.

The purpose of COGSA in general and section 1304(6) in particular was to lay down predictable rules allocating the risk inherent in the shipment of such goods – rules which the shipper, the carrier and others (such as banks and marine insurance underwriters) could rely upon. *Senator Linie, supra*, 148, 169; *Stolt Tank Containers v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992). Moreover, the case law to date has been unanimous in allowing ocean carriers to rely on the stowage provisions of the IMDG Code in determining the care to be given to any of the thousands of dangerous cargoes listed there. *See, e.g., Standard Commercial Tobacco Co., Inc. v. M/V RECIFE,* 827 F. Supp. 990, 997-1000 (S.D.N.Y. 1993) The Code is not only mandatory (it governs in the U.S. by way of the Department of Transportation ["DOT"] regulations), it provides an *objective*, comprehensive, uniform and well known set of

instructions that applies industry-wide. *M/V RECIFE, supra* at 994. That kind of uniformity and certainty was and is essential if shippers, carriers, banks, underwriters and others are to be able to assess their risks and if the maritime trade is to prosper.

Almost four years ago, the Second Circuit handed down an exhaustively researched and well thought out opinion defining the obligations of shippers of undeclared hazardous cargo by sea. Recognizing the enormous potential for destruction by the shipment of dangerous goods whose nature and character were not known to the ocean carrier, this Court imposed a standard of strict liability upon such a shipper, even if the shipper was unaware of the dangers its cargoes posed. *See Senator Linie, supra.* Although the *Senator Linie* carrier's lack of knowledge of the cargo's dangerous propensities was complete rather than partial as in this case, that is a distinction without a difference as we will explain.

The decision in *Senator Linie* rested on two pillars. First, such a liability regime under section 1304(6) was not only warranted by the language of the statute, but it "is consonant with COGSA's goals of fostering international uniformity in sea-carriage rules and allocating risk between shippers and carriers in a manner that is consistent and predictable" and upon which others can rely. *Id.* at 148, 168. Second, the *Senator Linie* Panel concluded that:

> . . . a strict-liability construction of § 1304(6) will foster fairness and efficiency in the dealings of commercial maritime actors. In contrast to a carrier, which typically is in the position of taking aboard its vessel a large quantity and variety of cargoes, a shipper can be expected to have greater

> access to and familiarity with goods and their manufacturers before those goods are placed in maritime commerce. If an unwitting party must suffer, it should be the one that is in a better position to ascertain ahead of time the dangerous nature of shipped goods.

*Id.* at 169. The *Senator Linie* decision has been very well received, and there is no reason why section 1304(6) would not equally apply to hazardous cargo in a situation where the shipper, who is also the manufacturer, intentionally conceals the fact the critical temperature of such cargo will decompose with an evolution of a dangerous quantity of heat and gas under normal transportation conditions.

The Second Circuit's ruling in this case neuters *Senator Linie* on a fact pattern arguably more egregious. Unlike the *Senator Linie* shippers, the respondent in this case was also the manufacturer. Moreover, this manufacturer knew full well that the nature and character of its cargo was more dangerous than was set out in IMDG Code [*Slip Op., 3:5-6; 6:7-9*], yet to save the expense of special transport care (e.g., loading the cargo in a refrigerated container), it never disclosed that additional danger to petitioner. *See Slip Op., 6:10-11.* Explicit in section 1304(6) is the idea that there can be no consent unless it is an informed consent. *Yet, the Second Circuit absolved the defendant from its failure to obtain the carrier's informed consent on grounds that are legally and factually without support – including an obvious misreading of a regulation it thought to be dispositive.* The decision herein places the onus of acquiring knowledge of hazardous goods on the party that is in the worst position to acquire it – the ocean carrier. Moreover, it leaves the carrier unable to rely on the one practical source of information available to

it about the goods – the IMDG Code which, until the Second Circuit's decision, has been the carrier's "Bible" on dangerous goods.

Given the continuing technological advances in industry, more hazardous goods are finding their way into international commerce. Moreover, the continued development of new products and materials means that the dangerous nature and character of such goods is often not fully known until there is a catastrophe – and catastrophes there have been.

There have been an increasing number of ship disasters caused by the dangerous goods whose nature and character were not disclosed or fully disclosed to the carrier. *See, e.g., Senator Linie, supra*; *In re DG HARMONY,* 394 F. Supp.2d 649 (S.D.N.Y. 2005). Unlike normal cargo loss and damage which affects only individual cargo, dangerous goods pose a risk to other cargo and to the entire ship as well as to life – hence the basis for strict liability under COGSA sect. 1304(6).

Given all that is at stake, it is essential to get this case right. With all due respect, the Second Circuit got it wrong and the fallout for the trade promises to be severe.

The Individual IMDG Code Schedule Page for each specific hazardous cargo, of which there are several thousand, can now be ignored, (where previously, it was the "Bible"), in favor of some subjective standard that a carrier can never know until a judge tells him, too late, what it is. The inevitable result is severe disruption in the movement of hazardous cargo – or even worse, the decision by carriers to shut such cargo out altogether as too risky to carry. That in turn poses serious problems for the nation's economy and for U.S. consumers since needed products may no longer be available,

or if available will skyrocket in cost. Equally troublesome, it totally throws out for purposes of a vessel's Document of Compliance and ship's building plan (like that of the CONTSHIP FRANCE) in response to complying with SOLAS requirements which incorporate the IMDG Code, subsequently adopted by the DOT 49 C.F.R. requirements, as the mandated reference for stowing cargo on U.S. and non-U.S. import/export shipments.[1] In turn, marine insurance is thrown out of whack.

The facts of this case are simple and undisputed. The respondent shipper/manufacturer delivered a cargo of known dangerous goods to the petitioner. The cargo was listed in the IMDG Code which contains two relevant provisions. The *general* IMDG Code provisions provide broad preliminary comments for both hazardous cargo in general and for the various Classes of hazardous goods and, for stowage requirements, refer to Individual Schedule Pages for the particular type of hazardous cargo.[2] The *specific* IMDG Code provision, e.g., Individual Schedule Page, for this cargo (e.g.,

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1. Both the U.S. and Germany are signatories to SOLAS. A Document of Compliance ("DOC") is issued by the ship's State of Registry, (the CONTSHIP FRANCE flew the German Flag), and states what hazardous cargoes are allowed to be stowed in each Ship's hold. Here, the DOC for the CONTSHIP FRANCE allowed the CalHypo to be stowed anywhere within Hold 3. Shipbuilding plans reference SOLAS to reflect that it was built in accordance with the IMDG Code requirements.

2. *See IMDG Code, Gen'l Intro., Stowage 14.2* ("Substances, materials and articles should be stowed as indicated *in the individual schedules. . . .*"); *Id.* at *CLASS 5.1 Gen'l Intro. – Oxidizing Substances, Stowage 3.1* ("Class 5.1 oxidizing substances should be stowed as indicated *in the individual schedules. . . .*") (Emphasis added.).

UN No. 2880, Class 5.1, CalHypo), stated that it should be stowed "away from sources of heat where temperatures in excess of 55 C for a period of 24 hours or more will be encountered."[3] *(55C refers to temperature in the immediate vicinity of the package); (Stowing away from sources of heat reaching 55 C for 24 hrs. or more is not the same as stowing away from sources of heat).* The defendant knew that the cargo would suffer a runaway thermal reaction at a lower temperature than that in a ship's hold [*Slip Op. 3:5-6*], but said nothing to petitioner. The result was a shipboard explosion and fire that occurred in port – a port disaster being considered one of the greatest threats to national security. The explosion and fire in Papeete, Tahiti could as easily have occurred in a U.S. port with a dense population surrounding it.

Given the standard rule of construction that specific provisions take precedence over general ones, one would think that the petitioner's claim under 1304(6) would have succeeded since the ambient temperature of the hold did not exceed 47 degrees C, the critical temperature of the CalHypo at issue. Instead, the Second Circuit cited to the district court reference in *DG HARMONY* litigation (which found against the respondent in this case with respect to the identical cargo loaded in 300 lb. drums) for the proposition that the IMDG Code advises *carriers* to stow potentially unstable materials at ten degrees cooler than their critical temperatures (which the IMDG Code identified as 55 C for this cargo). However, that regulation [49 C.F.R. 173.21(f)] is directed not to *carriers* but to *shippers* who are required to ship such cargo

3. In contrast, the separate Individual Schedule Pages for Class 5.1 CalHypo U.N. No. 1748 and U.S. No. 2208 provide that such stowage is "away from sources of heat" and "on deck only," respectively, without any reference to surrounding temperatures.

in a temperature controlled environment at 10 C below the critical temperature when the critical temperature is 50 C or less and above 35 C. The mandate is to the *shipper*. The regulation has absolutely no applicability to carriers.

Without that regulation to fall back on, the Second Circuit's decision has absolutely no support in the law. Ocean common carriers must accept cargoes of all kinds, and they do not have the time or resources to track the industrial developmental status of every cargo they carry. Millions of containers come across U.S. ports each year, and hundreds of thousands of those contain hazardous goods. Absent some reason to believe the they are nonconforming, all a carrier can reasonably be expected to do for known dangerous goods is to comply with the stowage requirements of the Individual IMDG Code Schedule. Unless this Court is prepared to disregard long established rules of construction, [*South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 348 (1998) (Specific provisions take precedence over general ones)], there is nothing to show that the petitioner in this case failed to comply.[4]

If petitioner had failed to use due diligence to make the vessel seaworthy, then there might be an argument against

4. If we take the Second Circuit at its word that stowage of the defendant's cargo at 47 C violated the general IMDG Code provision against stowage of that class of goods near sources of heat, then it means that the specific provision prohibiting stowage at 55C becomes superfluous as do all the other thousands of hazmat specific schedules. It also means that the general provision trumps the specific. Such a construction would be directly contrary to those long established rules of construction set out in the *Senator Linie* case among many others. *M/V RECIFE,* supra, at 998 (Specific IMDG Schedules take precedence over statements in the General Introduction).

the imposition of strict liability, but that is not the case here. The measure of seaworthiness is whether the ship is fit to carry the cargo contracted for [*The SILVIA,* 171 U.S. 462 (1898)] and by all accounts the CONTSHIP FRANCE was. By booking the dangerous cargo under its IMDG Code name and identifying U.N. number, but providing no qualifying information to indicate that its character was more dangerous than set out in the IMDG Code, the defendant shipper/ manufacturer effectively contracted with the petitioner to carry a cargo that was less dangerous than what was actually shipped. If the vessel was fit to carry the cargo as described in the IMDG Code, and the DOC allows for it within the Hold so stowed, then the vessel was seaworthy, and a decision which puts the blame for any resulting catastrophe on the carrier is both anomalous and misguided. Further, it rewards the shipper/manufacturer for being deceitful.

The Second Circuit tried to draw a distinction between a carrier that has no knowledge that a cargo is hazardous, and a carrier who knows cargo is hazardous, but has no reason to believe that it is more hazardous than is known by industry standards. By the Second Circuit's pinched reading of section 1304(6), only the former can rely on the strict liability provisions of that section. The latter is forced to the greater evidentiary burden of proving negligence under section 1304(3) of COGSA. There are a number of serious problems with this approach.

First, it rewards shipper dishonesty and benefits shippers (including shippers from Third World and Islamic countries) who withhold critical safety information about the cargoes they ship. It provides a lesser incentive to shippers of dangerous goods – not just to inform the carrier about their actual dangerous propensities – but to even discover those

propensities through testing and development. The result is to make ocean carriers – and the maritime industry as a whole – the unwitting subsidizers of negligent hazardous goods manufacturers. Moreover, given the needs of Home Land Security, the last thing we need today are rules which make the shipment of mis-declared hazardous goods more likely.

Second, it puts into question the significance of the Individual Schedule Pages of the IMDG Code – a source of carrier information about hazardous goods that is objective, uniform and comprehensive. The IMDG Code is incorporated into the SOLAS Convention (of which the U.S. is a signatory). The IMDG Code is made the law of the United States through the Department of Transportation regulations at 49 C.F.R.. *See M/V/ RECIFE, supra* at 994. Thus, the IMDG Code cannot legally be displaced – especially with some vague and undefined criteria by which the section 1304(6) burden is shifted from the shipper (to give notice) to the carrier (to make inquiry and to guess at whether the IMDG Code stowage requirements are sufficient to comply with).

Third, it impedes governmental agencies charges with hazmat responsibilities from doing their job. The U.S. Coast Guard ("U.S.C.G.), for example, relies on the IMDG Code to determine the proper stow of dangerous cargo. If that Code is now to be disregarded in situations that cannot now be guessed at, the U.S.C.G. is left with no objective set of rules upon which to enforce corrective action.

Fourth, it is black letter law that there can be no true consent unless there is informed consent. BLACK's LAW DICTIONARY, *Informed Consent,* 779 (6th ed. 1991). The wording of the COGSA statute could not be clearer. For a

shipper of dangerous goods to avoid the strict liability provisions of section 1304(6), "the carrier must have *consented with knowledge of their nature and character.*" [Emphasis added.] Note the two requirements – *consent* and *knowledge*. Note also that the carrier's knowledge must extend to *both* the goods' "nature" and "character". If words are not to be construed as superfluous, then "nature" and "character" cannot mean the same thing. Even if the carrier knows of the dangerous *nature* of the goods, if it has not been told of the goods' additional dangerous propensities, then it has not consented with knowledge of their *character*. Thus, the Second Circuit's decision contravenes the plain wording of the statute.

Fifth, where governmental regulations provide for rules of conduct to govern safety, one satisfies his obligations of care by complying with them. The only exception is where the actor is on notice that greater care might be required. *Prosser & Keeton,* TORTS, 233 (main text at fns. 39 – 40 (5th ed. 1984). If something patent had placed petitioner on notice that the CalHypo posed a greater danger than set out in the IMDG Code, then reliance on the IMDG Code might have been insufficient. However, no one in this case has said that. Neither the district court nor the Second Circuit found that petitioner knew or should have known of the Cal Hypo's greater than normal dangerous propensities. Taking the Second Circuit's reasoning to its logical conclusion, the IMDG Code serves no useful purpose since carriers cannot rely on it even absent some indication of greater danger.

Sixth, there is a developing line of cases which have allowed carriers to rely on the specific stowage provisions of the IMDG Code. E.g., *The RECIFE, supra.* In line with COGSA, those cases offered a simple, easy to apply rule

that offered certainty in the allocation of risk inherent in the shipment of dangerous goods. The Second Circuit's decision now muddles that rule if it does not effectively eliminate it. In its place is uncertainty and confusion as to precisely what a carrier must do – and moreover, what the physical constraints of the trade will even allow it to do. In this respect, it cannot be ignored that containerships operate on a fixed port of call schedule which only allows them 8-12 hours in each port to complete load/discharge cargo operations. Carriers must now deal with possibilities and no clear direction or commonly accepted procedure.

This is a case in which the defendant manufacturer shipped a known hazardous cargo with a critical temperature well below that stated in the applicable IMDG Code section for that commodity and admittedly did not advise the ocean carrier of that fact – a fact which if known would have allowed the disaster to be averted. And yet, in a statement that is absolutely breathtaking in its sweep, the district court found and the Second Circuit affirmed that, "Nothing done or undone by PPG *contributed in any way or degree* to the fire on the CONTSHIP FRANCE. PPG *adequately complied* with *all its obligations*. . . ." [Emphasis added.] With all due respect to the distinguished judges involved, that judgment should not stand.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 21, 2006**

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

August Term 2005

(Argued: October 17, 2005 Decided: March 21, 2006)

Docket No. 05-0267-cv

CONTSHIP CONTAINERLINES, LTD.,

PLAINTIFF-APPELLANT,

CONTI ZWEITE CRISTALLO SCHIFFARHRTS GMBH & CO. KG MS CONTSHIP FRANCE, NSB NIEDERELBE SCHIFFAHRTSGES MBH & CO KG, SVERIGES ANGFARTYGS ASSURANS FORENING, also known as The Swedish Club, STEWART ARTHUR HOLMES, as underwriter for and on behalf of Lloyds Syndicates 724 & 2724, CHRISTINE E. DANBRIDGE, INDEPENDENT INSURANCE CO., LTD., LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, BERGENS SKIBSASSURANSEFORENING AND DEUTSCH VERSICHERUNGS-UND RUCKVERSICHERUNGS A.G.,

PLAINTIFFS,

v.

*Appendix A*

PPG INDUSTRIES, INC.,

DEFENDANT-APPELLEE.

DENNIS JACOBS, *Circuit Judge.*

This dispute arises from a fire aboard the *Contship France,* a carrier operated by plaintiff-appellant Contship Containerlines, Ltd. ("Contship"). The fire was caused by the overheating of a cargo of calcium hypochloride ("Cal Hypo") shipped by defendant-appellee PPG Industries, Inc. ("PPG"). Contship concedes awareness (based on published specifications) that Cal Hypo could ignite at temperatures *over* 55°C; and PPG concedes awareness that the cargo could ignite at lower temperatures. After a bench trial, the district court found that the proximate cause of the fire was Contship's failure to consider the impact of heat on the cargo when it stowed the cargo in a spot that sustained temperatures of at least 47°C. On appeal, Contship argues that the district court erred in dismissing its claims of strict liability and duty to warn. We affirm.

## BACKGROUND

This appeal considers whether a carrier may recover against a shipper in strict liability for loss caused by cargo that is known to be dangerous, and whether a shipper satisfies its duty to warn by disclosing the dangerous characteristics of cargo in less than specific terms.

Contship is an operator of ocean-going container vessels. PPG shipped 512 drums of Cal Hypo aboard the *Contship*

*France,* which sailed from Charleston, South Carolina, in late September 1997. Upon the ship's arrival in Tahiti, a fire broke out. The source of the fire was one batch of Cal Hypo, consisting of 80 drums each weighing 425 pounds.

The particular type of Cal Hypo at issue, designated "UN 2880" by Department of Transportation regulations, is known to be flammable. When exposed to heat at or above its "critical temperature," Cal Hypo will generate heat from decomposition faster than the heat can dissipate, resulting in a "thermal runaway" that can ignite surrounding materials. The critical temperature of a given drum of Cal Hypo depends in part on the volume of the drum. The district court found, upon expert testimony, that the critical temperature for the 425-pound drums of Cal Hypo was 47°C.

According to the district court, the shipped Cal Hypo was heated to ignition due to two errors committed by the crew. First, the container that caught fire was stowed directly above the bottom center fuel tank, exposing the cargo to the heat generated by the normal flow of oil on a vessel. Second, the ship's fuel was heated to abnormally high temperatures, further raising the ambient temperature. As a result, the district court found, "temperatures at the floor of the hold above the tank top and below the container caused the temperatures in some of the drums to reach . . . at least 47°C, the self-accelerating decomposition temperature of the calcium hypochlorite hydrate." The fire was caused by 18 days of constant exposure to these conditions.

Contship undertakes to demonstrate that relevant industry guidelines provide a default maximum storage

temperature of 55°C for Cal Hypo, and thereby afford assurance that Cal Hypo is safe at temperatures below that mark. Constship argues that it acted reasonably so long as it stowed Cal Hypo at temperatures below 55°C, and that PPG should be liable for not warning Contship that special care was needed for its shipment of (allegedly) unusually unstable Cal Hypo.

Relevant Department of Transportation regulations in force at the time of the fire incorporated the International Maritime Dangerous Goods ("IMDG") Code-adopted by the United Nations as an international regime for the classification and regulation of hazardous sea cargoes. *See* 49 C.F.R. § 171.12 (1998); 49 C.F.R. § 172.101 (1996). The IMDG Code required stowage of Cal Hypo "[a]way from sources of heat where temperatures in excess of 55°C for a period of 24 hours or more will be encountered." Contship interprets this standard as assuring safety below 55°C, rendering stowage reasonable at temperatures below 55°C in the absence of contrary advice from the shipper.

PPG acknowledges that it was aware before shipping that the critical temperature of its 425 pound Cal Hypo drums was lower than 55°C. Contship, therefore, alleges that PPG owed it a duty to warn, which PPG violated by failing to disclose the atypical and unsuspected danger of the shipped Cal Hypo. Alternatively, Contship alleges that PPG is strictly liable for shipping latently dangerous cargo.

PPG argues that the quoted regulation does not guarantee that temperatures below 55°C are safe for Cal Hypo, because Cal Hypo's critical temperature varies according to container

size and therefore could not be stated categorically. PPG adds (and the district court agreed) that the IMDG Code, taken as a whole, bars storage of Cal Hypo near sources of extreme heat, such as fuel tanks. The district court found that "[s]towing [Cal Hypo] as Contship did, in violation of the [C]ode and atop a constant source of heat, was not a normal condition of transport. The stowage was equally improper for a product with an actual [critical temperature] of 55°C."

The District Court placed full blame on Contship:

> The fire . . . was not caused by Contship stowing the cargo at an appropriate location for [a critical temperature] of 55 but inappropriate for 47°C, it was caused by *Contship's stowage entirely disregarding the factor of heat.* Nothing done or undone by PPG contributed in any way or degree to the fire on the Contship France. PPG adequately complied with all its obligations . . . .

Trial transcript at 1366 (emphasis added). Contship appeals both the district court's fault assessment, and the dismissal of the strict liability claim.

## DISCUSSION

This Court reviews the district court's findings of fact for clear error. Conclusions of law are reviewed *de novo. Senator Linie GMBH & Co. KG v. Sunway Line, Inc.,* 291 F.3d 145, 151 (2d Cir.2002). Attributions of fault among the various parties are considered factual determinations and therefore are reviewed under the clearly erroneous standard.

*See Ching Sheng Fishery Co. v. United States*, 124 F.3d 152, 157 (2d Cir.1997) ("A district court's finding on issues of causation and on its allocation of fault among negligent parties continues to be subject only to clearly erroneous review.").

**I.**

Contship's strict liability claim is premised on its interpretation of the Carriage of Goods by Sea Act ("COGSA"), which distributes liability between shipper and carrier as follows:

> [for g]oods of an *inflammable, explosive or dangerous nature* to the shipment whereof the carrier . . . has not consented *with knowledge of their nature and character* . . . the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

46 U.S.C.App. § 1304(6) (2004) (emphasis added). Is strict liability a claim available to a carrier that knew the cargo was flammable but had reason to think that it was safe enough under the conditions of stowage?

Under COGSA, dangerousness is an aspect of a cargo's "nature and character." The shipper's knowledge seems to be no consideration: Shippers are strictly liable for loss caused by inherently dangerous shipments where neither the shipper nor the carrier appreciates that the cargo is inherently dangerous. *Senator Linie*, 291 F.3d at 148.

*Appendix A*

We conclude that a carrier cannot invoke strict liability if it knows that a cargo poses a danger and requires gingerly handling or stowage, and nevertheless exposes the cargo to the general condition that triggers the known danger, regardless of whether the carrier is aware of the precise characteristics of the cargo. This principle is implicit in *Senator Linie* (relied on by Contship), which considered generally whether the carrier (or shipper) was "on notice that an exothermic reaction . . . was possible." *Id.* at 152 (internal quotation marks omitted). In such a binary analysis, a party either will know that such a reaction is possible or it will not; the calibrated likelihood of an exothermic reaction under a variety of heat circumstances is not considered. *Senator Linie* reinforces that dichotomy in another passage, which considers whether the cargo was "considered a stable compound" on the one hand, or deemed "inherently dangerous" on the other. *Id.* at 149, 152-53, 156. A carrier that exposes a cargo to heat with knowledge of its flammability may or may not ultimately prevail-depending on the particulars of what it and the shipper knew and their respective duties-but it cannot prevail on strict liability. *See Ionmar Compania Naviera, S.A. v. Olin Corp.*, 666 F.2d 897, 904-05 (5th Cir.1982) (concluding that the liability of a shipper for a fire caused by Cal Hypo depended on whether shipper negligently violated its duty to warn of dangers the carrier could not reasonably have been expected to know).

In this case, such a "nature and character" inquiry defeats Contship's strict liability claim. The "nature and character" of Cal Hypo is that it is flammable at elevated temperatures. Knowing Cal Hypo's tendency to lose thermal stability when heated, Contship stowed it in a superheated spot. Contship

may not invoke strict liability where it brought about the very danger it knew to lie latent in its cargo.

## II.

In the alternative, Contship argues that PPG's superior knowledge as to Cal Hypo's specific dangerousness at temperatures under 55°C created a duty to warn under COGSA's negligence provision: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause *without the act, fault, or neglect of the shipper* . . . ." 46 U.S.C.App. § 1304(3) (2004) (emphasis added).

A shipper's failure to adequately inform a carrier of the foreseeable dangers posed by cargo can constitute a negligent failure to warn under § 1304(3). As the Fourth Circuit has explained, "[u]nder general maritime law a shipper has a duty to warn the stevedore and the ship owner of the foreseeable hazards inherent in the cargo of which the stevedore and the ship's master could not reasonably have been expected to be aware." *Ente Nazionale Per L'Energia Electtrica v. Baliwag Navigation, Inc.*, 774 F.2d 648, 655 (4th Cir.1985); *see also O'Connell Mach. Co. v. M.V. "Americana"*, 797 F.2d 1130, 1134 (2d Cir.1986) (shippers have "an obligation to inform the carrier of special requirements regarding stowage location"). However, liability for a supposedly negligent omission is inappropriate where "the particular event would have occurred even without the allegedly negligent . . . omission." *Ente Nazionale*, 774 F.2d at 655. Thus, liability for failure to warn is only appropriate if there is evidence that a "warning would have altered the [carrier's] actions." *Id.* at 657.

*Appendix A*

Contship's negligent-failure-to-warn claim requires two showings: (1) that PPG failed to warn Contship about dangers "inherent in the cargo of which the stevedore and ship's master could not reasonably have been expected to be aware"; and (2) that an absent warning, if given, would have impacted stowage.

1. Could Contship reasonably be expected to know the inherent dangers of PPG's Cal Hypo cargo? Professional carriers might be reasonably expected to exercise caution, and *not* stow flammable compounds in the hottest hold on a ship, at temperatures exceeding 47°C-that is, 115°F; but Contship emphasizes the supposedly reliable stability of Cal Hypo at or below 55°C, absent circumstances that PPG knew and Contship did not. This argument is dubious.

Contship concedes that it could be expected to be aware of dangers detailed in the IMDG Code. Several provisions of the Code give notice to carriers that Cal Hypo is dangerous at temperatures approaching 55°C. Thus, the IMDG Code advises carriers to stow potentially unstable materials with critical temperatures over 35°C in conditions at least ten degrees cooler than the critical temperature. *See In re M/V DG Harmony,* 394 F.Supp.2d 649, 659 (S.D.N.Y.2005) ("The IMDG Code provides that cargo having an SADT [Self Accelerating Decomposition Temperature] of 'over 35°C' (95°F) must be transported at a 'control temperature' of 10°C less than the SADT."). Contship's contention that it could reasonably expect danger only at or above the critical temperature of 55°C is undermined by the cited warning in the IMDG Code against stowage at temperatures greater than 45°C.

That said, we need not decide this appeal by interpreting which dangers are conveyed by a reasonable reading of the IMDG Code, because the district court's findings on the issue of causation are fatal to Contship and are not clearly erroneous. *See* Fed.R.Civ.P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .").

2. The district court found that Contship was unconcerned with the effect of heat on Cal Hypo, and that additional warnings therefore would not have averted the loss. Specifically, the district court found that "Contship's stowage entirely disregard[ed] the factor of heat" due to the Contship stowage planner's "unfortunate belief that his function was only to designate whether stowage should be above or below deck." Contship's dangerous goods coordinator believed that Cal Hypo could be carried "under deck without any real consideration as to its position in the stow." Seemingly acting on this belief, Contship stowed the flammable, heat-sensitive Cal Hypo near the heated fuel tank, an area of the ship maximally subjected to fluctuations of heat. As no one involved in stowing Cal Hypo was much concerned with the IMDG Code's 55°C warning, the court did not err in finding that no one at Contship would have reacted to warnings of a somewhat lower critical temperature.

The likely effect of a warning is a fact question best left to the finder of fact. Since the district court's finding on this point is not clearly erroneous, the court properly dismissed Contship's claim for negligent failure to warn under § 4(3) of COGSA.

*Appendix A*

## CONCLUSION

We have considered the parties' remaining arguments and find each of them to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

## APPENDIX B — FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 13, 2004

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

New York, N.Y.

00 Civ. 194 (LLS)

CONTSHIP,

Plaintiff,

v.

PPG INDUSTRIES,

Defendant.

Before: HON. LOUIS L. STANTON,
District Judge

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

* * *

THE COURT: Thank you, Mr. Vengrow.

The following will serve as my findings of fact and conclusions of law.

*Appendix B*

I reserve the right to make editorial changes and minor amendments to the text, but not to change the substance of the opinion.

I find as facts all those agreed in the joint pretrial order.

The bills of lading identified the contents of the drums as calcium hypochlorite hydrate and gave its UN number 2880 and its classification under the IMDG code as 5.1 which directed the stowage planner to the requirement that it be stowed "away from sources of heat where temperatures in excess of 55-degrees Centigrade for a period of 24 hours or more will be encountered."

In the unfortunate belief that his function was only to designate whether stowage should be above or below deck, the Contship stowage planner at Ipswich ignored the requirement that the 2880 be stored away from heat. Stowed away from heat. This led to the preparation of a stowage plan which placed a container of 2880 directly on top of the Contship France's No. 5 center double-bottom fuel tank.

Contrary to the understanding of Contship France's chief officer, the program did not recognize that this tank was a prolific source of heat, and that is where the Contship France's chief officer placed it.

During the voyage, the tank top reached levels heating the floor of the hold to a constant temperature of around 50-degrees Centigrade, which is 122-degrees Fahrenheit, which in turn raised the temperature inside the drum to 47-degrees Centigrade or more long enough for the cal hypo

to commence self-accelerating decomposition and the resulting severe fire in the hold.

All witnesses concurred that it is better or safest to stow heat-sensitive cargo away from any source of heat. There were many such locations available on the Contship France. The IMDG code requires the safest stowage, which could readily have been done by switching the locations of the standard 20-foot containers away from any heat source.

Substantial numbers of shipments of 2880, a few shipped in drums of sizes like those involved in this voyage, had been carried for years without incident on vessels operated by Contship.

What led to the disaster in this case are two converging factors — the placement of the container directly above the bottom center fuel tank, in violation of the safety code, and the large amount of heat generated in that tank directly below the bottom of the container in which the 2880 was stowed.

From the time of departure from Charleston, South Carolina, until arrival at Papeete, the Contship France's engineers alternately heated its port and starboard wing fuel tanks in the No. 3 hold bringing them to the unnecessary and exceptionally high temperature of 64-degrees and 82-degrees Centigrade respectively. That is 147 and 179-degrees Fahrenheit. The flashpoint of the fuel oil is about 82 degrees Centigrade.

None of the experienced sea-going witnesses could understand why such high temperatures were maintained. The

heating coils in the wing fuel tanks were fed by a steampipe at a temperature of about 125-degrees Centigrade and the condensate was returned at about 115-degrees Centigrade by another pipe.

Both the steam line and the condensate return line were in constant operation. They both ran through the No. 5 double-bottom center fuel tank constantly heating it, because the alternate switching between the port and starboard fuel tanks take place downstream of the fuel tank in the steam line. Outboard of the fuel tank were port and starboard water ballast tanks, but they abutted the wing fuel tanks whose extremely high temperatures heated the water tanks and made them useless in cooling the center fuel tank.

Although subjected to an extended and detailed attack, Dr. McCarthy's model of the factors affecting the temperature within and at the top of the No. 5 center double-bottom fuel tank is based on reasonable and conservative assumptions. Its processes and calculations are reliable. His conclusions may understate, but do not overstate, the temperatures at the floor of the hold and inside the drum.

Thus, I find, in accordance with his analysis and conclusions, that temperatures at the floor of the hold above the tank top and below the container caused the temperatures in some of the drums to reach temperatures of at least 47-degrees Centigrade, the self-accelerating decomposition temperature of the calcium hypochlorite hydrate.

*Appendix B*

Exposure of the drums' contents to these temperatures for 18 days, from the date of departure from Charleston, South Carolina, to arrival at Papeete, Tahiti, caused decomposition of the calcium hypochlorite with resulting rapid conversion into heat and oxygen creating the fire which damaged hold No. 3 and adjoining positions of the Contship France and its contents.

As plaintiff's expert witness, Dr. Bell, testified, at transcript pages 436 to 437:

"Q. From a scientific standpoint, your answer to number one, the question number one that was put to you, is that the likely tank top temperature was 50 degrees. Is it not 50-degrees Centigrade?

"A. I estimated that it would likely be in that range." Then skipping a few lines:

"Q. The 50-degree tank top temperature, however, was the product, was it not, of the heated steam condensate pipe heating the fuel oil in the No. 5 center double-bottom tank, which in turn heated the tank top to what you estimate to have been 50-degrees Centigrade, correct?

"A. That is correct."

At pages 438 to 439, he testified:

"Q. If this fire started in the cal hypo container in 250202, it was the result, was it not, of heat from the steam condensate pipe in turn heating the fuel oil, in turn heating

the tank top, in turn heating the air inside the container to a temperature in excess of the critical ambient temperature of the product in the drums which over time, if undiminished, would lead, in your opinion, to a thermal runaway of the product in the drums?

"A. I think this is the essence of my opinion, yes.

"Q. So the essence of your opinion is that the source of heat in the steam condensate pipe would cause the thermal runaway of the product given enough time at the temperature levels you predict, correct?

"A. I believe that's correct, yes, as I understand it."

Of course, all of the conditions of stowage and of carriage and heat are the work of Contship, not PPG.

So that brings us to a persistent claim in Contship's case. That is, that because the actual SADT of 2880 when shipped, as this shipment was, in 193 kilo, that is, 425-pound drums, was 47 degrees rather than 55-degrees Centigrade, it was required to be shipped in refrigerated containers. The answer is that it is not.

Plaintiff's expert witness Captain Rogers tried twice to elicit support for plaintiff's theory from the Department of Transportation, and each time he was rebuffed.

His first letter, Joint Exhibit 42, asked for confirmation that any material "which is likely to decompose with an SADT of 50-degrees Centigrade or less" had to be transported

under temperature control requirements. The Department of Transportation responded, Joint Exhibit 46, that calcium hypochlorite hydrated, UN2880, was neither forbidden nor required to be shipped under temperature-controlled conditions because "the material is not likely to decompose under normal conditions of transport."

About the same time Mr. Gordon Rousseau wrote the department, specifically pointing out that the SADT of the product is between 47-degrees Centigrade and 50-degrees Centigrade and that it would be shipped in 300- and 425-pound fiber drums and asking for confirmation that its shipment is neither forbidden nor required to be temperature controlled.

The Department of Transportation responded to Mr. Rousseau in Joint Exhibit 45 as follows: "This response is to your February 23, 2004 letter on behalf of PPG Industries, Inc. concerning the transportation of calcium hypochlorite hydrated, UN2880, under the hazardous material regulations (HMR 49 C.F.R. parts 171 through 180). Specifically, you asked if calcium hypochlorite hydrated, UN2880, transported in 300- and 425-pound fiber drums is a forbidden material within the meaning of section 173.21 of the HMR.

The answer is, No, notwithstanding that the self-accelerated decomposition temperature (SADT) of calcium hypochlorite hydrated, UN2880, in the drums is slightly less than 50-degrees Centigrade. The material is not forbidden under section 173.21 because the material is not likely to decompose under normal conditions of transport when

shipped in accordance with applicable regulatory requirements. Under the HMR, calcium hypochlorite hydrated, UN2880, is not subject to the controlled-temperature provisions of section 173.21(f) when transported in the quantities and packages specified in your letter."

Then skipping a sentence: "Similarly, calcium hypochlorite hydrated, UN2880, is not a prohibited material or subject to temperature-controlled requirements under the provisions of the International Maritime Dangerous Goods (IMDG) Code. Under both the HMR and the IMDG code, calcium hypochlorite hydrated, UN2880, is subject to the stowage provisions that require it to be stowed away from heat."

Captain Rogers tried again, this time addressing particularly the point that the size of the package "may adversely contribute to the commodity's thermal stability" — that is Joint Exhibit 47 — because it is well known that a greater quantity of UN2880 has a lower SADT than a smaller quantity.

The Department of Transportation replied in Joint Exhibit 48: You also ask that we confirm that "when packages are selected for hazardous commodities, when the shipper has or should have knowledge that the package size selected may adversely contribute to the commodity's stability, that the shipper is required to determine if the commodity meets SADT criteria regardless of whether the package is generally authorized by the regulations.

*Appendix B*

"With regard to calcium hypochlorite hydrated, UN2880, your understanding is incorrect. As discussed above and at our meeting, when transported in accordance with applicable HMR requirements, including the quantities and packages specified in the HMR, calcium hypochlorite hydrated is not likely to decompose under normal conditions of transport and is not subject to the provisions of section 173.21(f)."

That is the end of the quote.

The letter also responded to Captain Rogers' request, drawing attention to the changed language in the regulations from the one which specified exposure to 55 degrees or more for 24 hours and the present regulation which says only stow away from sources of heat. The answer, JX48, said that that did not change the substance of the response it gave.

The Department of Transportation's responses stressed in each case that the 2880 should be stowed away from sources of heat but was not likely to decompose under normal conditions of transport. Stowing them as Contship did, in violation of the code and atop a constant source of heat, was not a normal condition of transport. The stowage was equally improper for a product with an actual SADT of 55-degrees Centigrade.

That disposes of Contship's arguments on COGSA and under general maritime law theories that PPG had a duty to warn Contship that the cal hypo's SADT was 47- to 49-degrees Centigrade rather than 55-degrees Centigrade.

*Appendix B*

It was well established and clear from the reference set forth in the bill of lading that the cal hypo was a dangerous substance which should be stowed away from sources of heat. Nevertheless, as repeatedly stated by the Department of Transportation, it is not likely to decompose under normal conditions of transportation.

The fire at Papeete was not caused by Contship stowing the cargo at an appropriate location for an SADT of 55 but inappropriate for 47-degrees Centigrade, it was caused by Contship's stowage entirely disregarding the factor of heat.

Nothing done or undone by PPG contributed in any way or degree to the fire on the Contship France. PPG adequately complied with all its obligations as a manufacturer and shipper of the calcium hypochlorite hydrated.

The complaint is dismissed and judgment will be entered in favor of defendant together and with costs and disbursements according to law.

* * * *

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 23, 2006

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

| | |
|---|---|
| Docket Number: | 05-0267-cv |
| Short Title: | Contship v. PPG Industries, Inc. |
| DC Docket Number: | 00-cv-194 |
| DC: | SDNY (NEW YORK CITY) |
| DC Judge: | Honorable Louis Stanton |

05-0267-cv

CONTSHIP

v.

PPG INDUSTRIES

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of May two thousand six.

*Appendix C*

A petition for panel rehearing and a petition for rehearing en bane having been filed herein by the appellant Contship Containerlines, Ltd. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en bane has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/ Tracy W. Young
Motion Staff Attorney

## APPENDIX D — RELEVANT STATUTE

49 C.F.R. 173.21(f)

Unless otherwise provided in this subchapter, the offering for transportation or transportation of the following is forbidden:

* * *

(f) A package containing a material which is likely to decompose with a self-accelerated decomposition temperature (SADT) of 50° C (122° F) or less, or polymerize at a temperature of 54° C (130° F) or less with an evolution of a dangerous quantity of heat or gas when decomposing or polymerizing, unless the material is stabilized or inhibited in a manner to preclude such evolution. The SADT may be determined by any of the test methods described in Part II of the UN Manual of Tests and Criteria (IBR, see *§ 171.7* of this subchapter).

(1) A package meeting the criteria of paragraph (f) of this section may be required to be shipped under controlled temperature conditions. The control temperature and emergency temperature for a package shall be as specified in the table in this paragraph based upon the SADT of the material. The control temperature is the temperature above which a package of the material may not be offered for transportation or transported. The emergency temperature is the temperature at which, due to imminent danger, emergency measures must be initiated.

(2) For self-reactive materials listed in *§ 173.224(b)* Table control and emergency temperatures, where required are shown in Columns 5 and 6, respectively. For organic peroxides listed in The Organic Peroxides Table in *§ 173.225* control and emergency temperatures, where required, are shown in Columns 7a and 7b, respectively.

(3) Refrigeration may be used as a means of stabilization only when approved by the Associate Administrator. For status of approvals previously issued by the Bureau of Explosives, see *§ 171.19* of this subchapter. Methods of stabilization approved by the Associate Administrator are as follows:

(i) For highway transportation:

(A) A material meeting the criteria of this paragraph (f) may be transported only in a transport vehicle, freight container, or motor vehicle equipped with a mechanical refrigeration unit, or loaded with a consumable refrigerant, capable of maintaining the inside temperature of the hazardous material at or below the control temperature required for the material during transportation.

(B) Each package containing a material meeting the criteria of this paragraph (f) must be loaded and maintained at or below the control temperature required for the material. The temperature of the material must be determined by appropriate means and entered on a written record at the time the packaging is loaded.

| Section 173.21 Table: Method of Determining Control and Emergency Temperature. | | |
|---|---|---|
| SADT [FN1] | Control temperatures | Emergency temperature |
| SADT <= 20 ° C (68 ° F) | 20 ° C (36 ° F) below SADT | 10 ° C (18 ° F) below SADT. |
| 20 ° C (68 ° F) < SADT <= 35 o C (95 ° F) | 15 ° C (27 ° F) below SADT | 10 ° C (18 ° F) below SADT. |
| 35 ° C (95 ° F) <= SADT <= 50 o C (122 ° F) | 10 ° C (18 ° F) below SADT | 5 ° C (9 ° F) below SADT. |
| 50 ° C (122 ° F) < SADT | ([FN2]) | ([FN2]) |

[FN1] Self-accelerating decomposition temperature.

[FN2] Temperature control not required.

(C) The vehicle operator shall monitor the inside temperature of the transport vehicle, freight container, or motor vehicle and enter that temperature on a written record at the time the package is loaded and thereafter at intervals not exceeding two hours. Alternatively, a transport vehicle, freight container, or motor vehicle may be equipped with a visible or audible warning device that activates when the inside temperature of the transport vehicle, freight container, or motor vehicle exceeds the control temperature required for the material. The warning device must be readily visible or audible, as appropriate, from the vehicle operator's seat in the vehicle.

(D) The carrier shall advise the vehicle operator of the emergency temperature for the material, and provide the vehicle operator with written procedures that must be followed to assure maintenance of the control temperature inside the transport vehicle, freight container, or motor vehicle. The written procedures must include instructions for the vehicle operator on actions to take if the inside temperature exceeds the control temperature and approaches or reaches the emergency temperature for the material. In addition, the written temperature-control procedures must identify enroute points where the consumable refrigerant may be procured, or where repairs to, or replacement of, the mechanical refrigeration unit may be accomplished.

(E) The vehicle operator shall maintain the written temperature-control procedures, and the written record of temperature measurements specified in paragraph (f)(3)(i)(C) of this section, if applicable, in the same manner as specified in *§ 177.817* of this subchapter for shipping papers.

*Appendix D*

(F) If the control temperature is maintained by use of a consumable refrigerant (e.g., dry ice or liquid nitrogen), the quantity of consumable refrigerant must be sufficient to maintain the control temperature for twice the average transit time under normal conditions of transportation.

(G) A material that has a control temperature of 40 degreesC (104 degreesF) or higher may be transported by common carrier. A material that has a control temperature below 40 degreesC (104 degreesF) must be transported by a private or contract carrier.

(ii) For transportation by vessel, shipments are authorized in accordance with the control temperature requirements in Chapter 7.7 of the IMDG Code (IBR, see *§ 171.7* of this subchapter).